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**INTERPRETATION OF CONTRACTS,
OBJECTIVITY AND THE ELISION OF THE
SIGNIFICANCE OF CONSENT REACHED
THROUGH CONCESSION AND COMPROMISE**

DAVID CABRELLI

Solicitor and Lecturer in Commercial Law

School of Law

University of Edinburgh

INTERPRETATION OF CONTRACTS, OBJECTIVITY AND THE ELISION OF THE SIGNIFICANCE OF CONSENT ACHIEVED THROUGH CONCESSION AND COMPROMISE

DAVID CABRELLI[#]

Introduction

To what extent do ‘consent’ and ‘intention’ continue to have a role to play in the process of construing the terms of contracts? Is the adoption of an increasingly objective approach towards the interpretative process consistent with an assertion that it can be equated to the marginalisation of the role of consent? If the dynamics of concession and compromise in commercial negotiations are facets of party consent, in what way may (if at all) the prevalence of the commercially sensible construction function to elide consensus? These are some of the questions which this paper will attempt to address. Since contract law is one of the vessels through which voluntary obligations are constituted and channelled and a contract involves the exercise by an obligor of his will and an expression of his intention to be bound,¹ one might think that the consent and intention of obligor and obligee would be fundamentally crucial to the construction of the terms encapsulating those obligations and duties. However, the courts have routinely stressed that the search for the true construction of the terms of written or oral contracts is concerned more about what the reasonable objective person would consider the mutual intentions of the parties to be rather than what they had intended to agree subjectively (individually or collectively). One of the principal merits of the objective approach is said to be that it avoids unjust results generated from ‘unfair surprise’ and protects the reasonable reliance interests of the parties to the contract and those whose rights, duties and liabilities may be affected by it.² On the other hand, the requirement to construe the terms of a commercial contract from

[#] Senior Lecturer in Commercial Law, School of Law, University of Edinburgh. An earlier version of this paper was presented at a workshop entitled *The Role of Consent in Contract Law: Principles and Practice* which was hosted by the Edinburgh Centre for Commercial Law at the University of Edinburgh on 7th December 2009.

¹ *The Laws of Scotland: Stair Memorial Encyclopaedia* (Vol. 15), *Contract* at paragraph 4.

² Scottish Law Commission, *Report on Interpretation in Private Law* (The Stationary Office, 1997), Scot. Law. Com. No. 160, para. 2.6.

the perspective of the objective and disinterested reasonable business outsider leaves the current legal position open to the charge that party autonomy and consent is unjustifiably overridden. This paper will strive to subject the objective standard to a measure of scrutiny and offer insights which serve to identify the implications of its application for party autonomy and consent.

The interpretative process in its historical context

The construction of an express term will be a live issue in the case of many contracts and can be contrasted with the process of interpretation *strictu sensu*, the latter process being confined to a literal translation whereas construction entails the attribution of meaning to words or terms from the spirit of the text.³ First, construction will be relevant where it is unclear whether the words which feature in the contract include or exclude certain circumstances, examples, factors or matters within their scope of application. Farnsworth has referred to this ‘scope’ factor as an example of what is referred to as ‘vagueness’ which is distinct from ‘ambiguity’.⁴ Words are ‘ambiguous’ where the words are capable of more than one meaning or connotation. For example, whether the verb “cast” means ‘throw out’⁵ or ‘appoint’.⁶ Furthermore, as the Scottish Law Commission has pointed out, the word ‘ambiguous’ is also used to describe an ‘expression [which] is unclear or uncertain.’⁷

Through careful analysis of primary sources, Clive has demonstrated that the traditional Scottish approach towards the construction of the terms of contracts followed a ‘mild’ or ‘weak’ form of subjective approach.⁸ The judiciary would

³ William W. McBryde, *The Law of Contract in Scotland* (3rd edition, Edinburgh W Green 2007) para. 8-05 at p. 199 and E. Farnsworth, “”Meaning” in the Law of Contracts” (1967) 76 *Yale LJ* 939, 939-940. Whilst respecting the prescience of this distinction, for ease of reference, the terms ‘interpretation’ and ‘construction’ will be used interchangeably in this paper.

⁴ Farnsworth, “”Meaning” in the Law of Contracts” (1967) 76 *Yale LJ* 939, 953. See also A. Schwartz & R. E. Scott, “Contract Theory and the Limits of Contract Law” 113 *Yale Law Journal* 541, 570-572 (2003).

⁵ As in ‘cast a net’.

⁶ As in ‘Noel Coward cast Edward Woodward to play the part of...’.

⁷ Scottish Law Commission, *Interpretation in Private Law*, 1997, para.2.12

⁸ Eric Clive, “Interpretation”, in K. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland* (Oxford, OUP, 2000), vol. 2, Chap. 2 at pp. 50-52, Stair,

attempt to ascertain the meaning of the terms agreed by the parties in the contract in accordance with what the parties thought they had intended to say at the time agreement was reached. The subjective approach is consistent with the ‘will theory’, i.e. that where there is a dispute, duly reflecting the consensual nature of a contract, the interpretative process must be focussed on the need to ascertain the collective intentions of the parties.⁹ However, by the time of Bell’s writings, the interpretative process had begun to drift away from a purely subjective approach towards the determination of the ‘mutual intentions’¹⁰ of the parties. As noted by Sir Christopher Staughton, the ascertainment of the parties’ ‘mutual intentions’ ‘does not necessarily mean what they [themselves] actually meant’,¹¹ but instead, as Bell noted in his *Commentaries*, it is concerned with the drawing of an:

‘...inference, by the act of reason, or the collecting from proper indications, of *the true meaning of the parties...* [and]... *according to the sense in which it was mutually understood and relied upon at the time of making it.*’¹²

As explained by Laura Macgregor, by the late nineteenth and early twentieth centuries ‘remnants of a subjective approach [we]re difficult to find’¹³ and Scots law in this period is characterised by an incremental gravitation towards an objective approach rather than a clearly recognisable and well-defined break from the subjective stance. However, the approach could not be categorised as fully 100 per cent objective in nature. Thus, before the decision of the House of Lords in *Investors Compensation*

Institutions IV.42.20 and 21, Bankton, *Institute* IV.45.50; Scottish Law Commission, *Interpretation in Private Law*, 1997, para.1.16.

⁹ Scottish Law Commission, *Interpretation in Private Law*, 1997, para.1.14; Clive, “Interpretation”, in K. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland*, 2000, vol. 2, pp. 50-52.

¹⁰ The limitations of seeking to ascertain the ‘intention’ of a contracting party or the ‘mutual intentions’ of the contracting parties are explored comprehensively in McBryde, *Contract*, 2007, para.8-03.

¹¹ Sir C. Staughton, “How do the Courts Interpret Commercial Contracts?” [1999] *Cambridge Law Journal* 303, 305. Writer’s annotations in square brackets.

¹² Bell, *Commentaries*, I, 455-456 (7th edition from 1870 by M’Laren);

¹³ L. MacGregor and C. Lewis, “Interpretation of Contract”, in R. Zimmermann, D. Visser and K. Reid (eds), *Mixed Legal Systems in Comparative Perspective* (Oxford, OUP, 2004), Chap. 3 at p. 69.

Scheme v West Bromwich Building Society,¹⁴ on one particular reading of the position,¹⁵ the Scottish courts appeared to be confined to looking at the circumstances surrounding the conclusion of the contract where the scope of application of the words was unclear, the words were capable of more than one interpretation, or they were latently ambiguous, i.e. the words or expressions deployed in the written commercial contract appeared to be clear, but the surrounding circumstances pointed to the presence of an ambiguity.¹⁶ By and large, in the cases decided according to Scots law prior to *Investors Compensation Scheme* the interpretative process was generally characterised by references to the natural and ordinary meaning which the words employed duly conveyed - which was a matter of 'impression',¹⁷ or dictionary definition. In theory at least, the courts were only allowed to look at the factual matrix and circumstances surrounding the conclusion of the contract where it had held that the words possessed no plain meaning.

¹⁴ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.

¹⁵ See *Multi-Link Leisure Developments Ltd. v North Lanarkshire Council* [2010] UKSC 47; 2011 SLT 184, 189 at para. [21] per Lord Hope. However, for an alternative, more circumspect, view, see E. Clive, "Interpretation", in K. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland* (Oxford, OUP, 2000), vol. 2, Chap. 2 at pp. 47-49 and the opinion of Lord Drummond Young in the decision of the Inner House in *Aberdeen City Council v Stewart Milne Group Ltd.* [2010] CSIH 81; 2010 G.W.D. 37-755 at para. [11], as well as the references to Scottish cases such as *Bank of Scotland v Stewart* (1891) 18 R 957, *Baird's Trs. v Baird & Co.* (1877) 4 R 1005, *Hunter v Barron's Trs.* (1886) 13 R 883 and *Jopp's Trs. v Edmond* (1888) 15 R 271 in Lord Bingham of Cornhill's contribution in "A New Thing Under the Sun: The Interpretation of Contract and the ICS Decision" (2008) 12 *Edinburgh Law Review* 374, 376 and 390. The case of *Miller v Mair* (1860) 22 D 660 is another example of a Scottish case where the surrounding context superseded the ordinary and natural meaning of the words and can be added to the Scottish cases of the ilk which Lord Bingham referred to in the said article.

¹⁶ See William M. Gloag, *Contract*, 2nd edn, (Edinburgh: W. Green 1929), pp. 399-400; *Crosse v Bankes* (1886) 13 R (HL) 40 at 41, per Lord Halsbury LC where he refers to the requirement to read and understand words in their 'ordinary and natural sense' as an 'ordinary rule of construction'. See also *M W Wilson (Lace) Ltd. v Eagle Star Insurance Co. Ltd.* 1993 S.L.T. 938 at 942 and 947 per Lord Justice Clerk Ross and Lord Kirkwood respectively. However, there is an argument that there is something particularly suspect in using 'context' to dislodge the clear meaning of words to create a latent ambiguity and then to subsequently re-apply the 'context' again to cure that latent ambiguity.

¹⁷ The word adopted by Lord Justice Clerk Ross and Lord Kirkwood respectively in *M W Wilson (Lace) Ltd. v Eagle Star Insurance Co. Ltd.* 1993 S.L.T. 938 at 942 and 947.

Whilst Lord Bingham has argued that Lord Hoffmann's approach in *Investors Compensation Scheme* was nothing like the sort of departure from the position adopted and applied by the common law courts in cases decided according to English law or Scots law before 1997,¹⁸ it is suggested that whilst there is certainly more than a kernel of truth in that contention, something seismic has occurred since 1997. It may be more a change of emphasis or mindset as opposed to a real palpable change in the applicable law, but a change it is nonetheless. The variety of reactions to Lord Hoffmann's approach in *Investors Compensation Scheme* provide some evidence that the propositions drawn in the decision have been perceived to have been far from insignificant.¹⁹ At the very least, Scots law can be said to have gone on something of a journey since the reception of *Investors Compensation Scheme* in *Bank of Scotland v Dunedin Property Investment Co Ltd.*²⁰ and it may be that this voyage can be conceptualised as a process of doctrinal affiliation giving way to pragmatic inclinations. It is suggested that the current method is perhaps symptomatic of a legal system which is adapting its rules of construction to respond to ever longer and more complex commercial contracts in light of rapid economic and technological developments. Indeed, *Investors Compensation Scheme* has established something akin to a presumptual shift which is equivalent to a greater sub-conscious willingness to apply a contextual, rather than a formalistic and literal, analysis. If that is the minimum which has occurred, it is submitted that, in itself, it is noteworthy for the repercussions which it has for the significance of party consent and intention in this particular branch of Scots contract law.

¹⁸ Lord Bingham of Cornhill, "A New Thing Under the Sun" (2008) 12 *Edinburgh Law Review* 374-390. Lord Hope would perhaps disagree, on which see *Multi-Link Leisure Developments Ltd. v North Lanarkshire Council* [2010] UKSC 47; 2011 SLT 184, 189 at para. [21].

¹⁹ See the reactions to the decision summarised by Lord Bingham of Cornhill in "A New Thing Under the Sun: The Interpretation of Contract and the ICS Decision" (2008) 12 *Edinburgh Law Review* 374, 381-388, referred to as 'the hostile, 'the wary' and 'the approving'.

²⁰ *Bank of Scotland v Dunedin Property Investment Co Ltd*, 1998 SC 657.

The Current Position

The recent ‘shift’ in position in Scots law²¹ is vouchsafed by the judgment of Lord Philip in *City Wall Properties (Scotland) Limited v Pearl Assurance plc*:

“... the court begins its consideration of the construction of a contractual provision already equipped with the information available as to the circumstances surrounding the contract, and that information is brought to bear on the court's consideration from the beginning. *The court does not begin by looking at the words themselves, as it were in a vacuum, without reference to the surrounding circumstances, in order to ascertain whether they have a plain meaning or whether there is an ambiguity.* To adopt that approach, it seems to me, is to assimilate so far as possible, the way in which the document is interpreted to the common sense principles by which any serious utterance would be interpreted in ordinary life, and to discard “the old intellectual baggage of ‘legal’ interpretation”. *If I am right in that interpretation, it was not necessary for the Lord Ordinary to decide that the words [in the contract] were ambiguous before he could deploy the evidence of the surrounding circumstances.*”²²

²¹ See the discussion in *Review of Contract Law: Discussion Paper on Interpretation of Contract* (Scot Law Com Discussion Paper No. 147) (2011) paras. 5.1 – 5.29 at pp. 42-57 and in particular at paras. 5.13 – 5.15 at pp. 48-50.

²² *City Wall Properties (Scotland) Limited v Pearl Assurance plc* [2007] CSIH 79 at para. [22]. Writer's emphases in italics and annotations in square brackets. A similar approach was adopted in *Waydale Ltd. v DHL Holdings (UK) Ltd. (No. 2)*. 2001 S.L.T. 224, 228 per Lord Hamilton (the benefit of the rights of a landlord under a guarantee was held to transmit to singular successors based on the surrounding circumstances and the commercially sensible construction), *Hardie Polymers Ltd. v Polymerland Ltd.* 2002 S.C.L.R. 64, 74 per Lord Macfadyen (clause in an agency agreement headed ‘Compensation After termination’ held to confer a right to an indemnity in favour of an agent on termination based on the surrounding circumstances and the context of the clause and the contract as a whole), *Howgate Shopping Centre Ltd. v GLS 164 Ltd.* 2002 S.L.T. 820, *Howgate Shopping Centre Ltd. v Catercraft Services Ltd.* 2004 S.L.T. 231, 241 at para. [35] per Lord Macfadyen (discount to open market rental value for the purposes of a rent review enured for the benefit of the prior tenant and did not transmit to an assignee), *MRS Distribution Ltd. v DS Smith (UK) Ltd.* 2004 S.L.T. 631, *Hutchison v Cameron* 2005 S.C.L.R. 773, *Royal Scottish Assurance v Scottish Equitable (No. 2)* [2005] CSOH 08; 2005 GWD 13-221 at para. [22] per Lord Bracadale, *Emcor Drake & Scull Ltd. v Edinburgh Royal Joint Venture* 2005 S.L.T.1233 at 1244–1245 per Lord Drummond Young, *Aberdeen City Council v Stewart Milne Group Ltd.* [2010] CSIH 81; 2010 G.W.D.

It is also evident in the judgment of Lord Reed in *Credential Bath Street Ltd v Venture Investment Placement Ltd.*²³ where his Lordship disapproved of the contention that words have a meaning outside their context and highlighted the fact that Lord Hoffmann's approach had been followed many times by the House of Lords. Nevertheless, it has also been said that the court should not search for any ambiguity where the words have only one natural and ordinary meaning and are incapable of more than one interpretation.²⁴

Notwithstanding Lord Philip's opinion in *City Wall*, there continue to be a great number of cases decided by the judiciary in Scotland subsequent to *Investors Compensation Scheme* where the courts have stipulated that it will not always be necessary to have resort to the surrounding circumstances on the basis that the words employed are unambiguous and have a natural and ordinary meaning.²⁵ The most compelling example is the recent judgment of Sir David Edward, QC in the decision of the Inner House in *Multi-Link Leisure Developments Ltd. v North Lanarkshire Council.*²⁶ Having doubted whether the contextual approach advanced by Lord Hoffmann in *Investors Compensation Scheme* formed part of Scots law, Sir David Edward QC asserted that "Our inquiry should start (and will finish) by asking what is the ordinary meaning of the words used."²⁷ Affirming the decision of the Inner House in the Supreme Court,²⁸ Lord Hope agreed that: "The court's task is to ascertain the intention of the parties by examining the words they used and giving them their

37-755 (construction of 'open market value' of property in missives to be construed in light of commercial common sense rather than literally) and *Green Island Organics Limited v QBE Insurance (Europe) Ltd.* [2011] CSOH 15; 2011 GWD 6-173 at paras. [51]-[59] (provision in insurance contract construed in light of contract as a whole and commercially sensible construction).

²³ 2008 Hous. L.R. 2, 6-7 at paras. [15]-[17].

²⁴ *Warren James (Jewellers) Ltd. v Overgate Group Ltd.* [2007] CSIH 14. This perhaps reflects an underlying judicial intolerance to the notion that 'context' can be deployed to dislodge the clear meaning of words to create a latent ambiguity and then subsequently re-applied to correct that latent ambiguity, see n 16 above.

²⁵ For a discussion of what 'natural', 'plain' or 'ordinary' meaning of words might mean in different contexts, see J. W. Carter and E. Peden, 'The 'Natural Meaning' of Contracts' (2005) 21 *Journal of Contract Law* 277.

²⁶ [2009] CSIH 96.

²⁷ [2009] CSIH 96 at para. [25].

²⁸ *Multi-Link Leisure Developments Ltd. v North Lanarkshire Council* [2010] UKSC 47; 2011 SLT 184.

ordinary meaning in their contractual context... [and the court] must start with what... is given by the parties themselves when it is conducting this exercise.”²⁹ Other cases in the same mould are *Bank of Scotland v Frank James Junior*,³⁰ *Loudonhill Contracts Ltd. v John Mowlem Construction Ltd.*,³¹ *Glasgow City Council v Caststop Ltd.*,³² *Atradius Credit Insurance NV v Whyte & Mackay Ltd.*,³³ *Middlebank Ltd v University of Dundee*,³⁴ *Autolink Concessionaires (M6) plc v Amey Construction Ltd.*³⁵ and *Forbo-Nairn Ltd. v Murrayfield Properties Ltd.*³⁶ All of the aforementioned cases explicitly or impliedly rely on the judgment of Lord Rodger in *Bank of Scotland v Dunedin Property Investment Co Ltd.*³⁷ In *Dunedin Property Investment*, Lord Rodger directed that he found it: “...helpful to start where Lord Mustill began...in *Charter Reinsurance Co Ltd v Fagan*...”³⁸ In *Charter Reinsurance Co Ltd v Fagan*, Lord Mustill had stated:

²⁹ *Multi-Link Leisure Developments Ltd. v North Lanarkshire Council* [2010] UKSC 47; 2011 SLT 184, 187 at para. [11] per Lord Hope and writer’s emphases in italics and annotations in square brackets. However, having differed from the reasoning of the Extra Division of the Inner House in *Multi-Link* by holding that the wording in the contract under scrutiny in the case was indeed ambiguous and the product of poor drafting, Lord Hope subsequently went on to apply the commercially sensible construction to reach the same result as the Inner House, on which see [2010] UKSC 47; 2011 SLT 184, per Lord Hope at [19]-[24]. Lord Rodger’s approach in *Multi-Link* differed from that of Lord Hope. Lord Rodger agreed with Lord Hope that the enquiry should start by focusing on the words employed in the contract, but that those words could then be deployed in order to make sense of other words in the contract which were opaque, on which see *Multi-Link Leisure Developments Ltd. v North Lanarkshire Council* [2010] UKSC 47; 2011 SLT 184, per Lord Rodger at [28].

³⁰ *Bank of Scotland v Junior*, 1999 S.C.L.R. 284, per Lord Penrose at 291.

³¹ *Loudonhill Contracts Ltd v John Mowlem Construction Ltd*, 2000 S.C.L.R. 111, PER Lord Rodger at 115.

³² *Glasgow City Council v Caststop Ltd*, 2002 SLT 47, 57 per Lord Macfadyen (OH) and *Glasgow City Council v Caststop Ltd*. 2003 S.L.T. 526 IH, per Lord Kirkwood at 531C.

³³ *Atradius Credit Insurance NV v Whyte & Mackay Ltd* [2005] CSOH 23, per Lord Drummond Young at [43]

³⁴ *Middlebank Ltd v University of Dundee* [2006] CSOH 202, per Lord Drummond Young at [13]

³⁵ *Autolink Concessionaires (M6) Plc v Amey Construction Ltd* [2009] CSIH 14, per Lord Kingarth at [23]

³⁶ *Forbo-Nairn Ltd v Murrayfield Properties Ltd* [2009] CSIH 94.

³⁷ *Bank of Scotland v Dunedin Property Investment Co Ltd*, 1998 SC 657

³⁸ *Bank of Scotland v Dunedin Property Investment Co Ltd*, 1998 SC 657 at 661.

“I believe that most expressions do have a natural meaning, in the sense of their meaning in ordinary speech...[t]he inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used”.³⁹

The upshot of this analysis is that one might consider Scots law as possessing two (not necessarily opposing) streams of authority travelling in parallel directions. However, this would perhaps be stretching the true position too far, since whether a court adopts the first or the second approach is unlikely to make a great deal of difference to the outcome. Indeed, it is more the case that is: “A matter of choice whether a judge in his reasoning first analyses the background facts before considering the relevant contractual provisions or looks first at the provision before testing his view of it against those facts”.⁴⁰ Nevertheless, on balance, it is submitted that the primacy of the surrounding circumstances and the application of the commercially sensible construction as the principal interpretative instruments is a paramount consideration, so that whilst the position in Scots law is not wholly free from doubt, the writer would adopt the description advanced by Macgregor which posits that:

“... the Scottish courts no longer consider themselves absolutely bound to find an ambiguity prior to hearing evidence of the surrounding circumstances.”⁴¹

Indeed, this view is shared by the Scottish Law Commission⁴² and as noted by Lord Hodge in *Luminar Lava Ignite Ltd v Mama Group plc & Mean Fiddler Holdings*

³⁹ *Charter Reinsurance Co Ltd (in liquidation) v Fagan* [1997] AC 313 at 384.

⁴⁰ *Luminar Lava Ignite Ltd v MAMA Group plc* [2010] CSIH 01; 2010 S.C. 310, per Lord Hodge at [38].

⁴¹ See L. Macgregor and C. Lewis, “Interpretation of Contract”, in R. Zimmermann, D. Visser and K. Reid (eds), *Mixed Legal Systems in Comparative Perspective* (Oxford, OUP, 2004), Chap. 3 at p. 81.

⁴² Scottish Law Commission, *Discussion Paper on Interpretation of Contract* (Scot Law Com Discussion Paper No. 147) (2011) paras. 5.14 – 5.15 at pp. 49-50. In asking consultees for their views in *Review of Contract Law: Discussion Paper on Interpretation of Contract* (Scot Law Com Discussion Paper No. 147) (2011) para. 7.9 at p. 72, the Scottish Law Commission appear to have presented a rule whereby ‘ambiguity in expression would not be a pre-requisite for consideration of the surrounding circumstances’ as their preferred option for law reform.

Ltd.,⁴³ the end result is that the factual matrix, surrounding circumstances and commercially sensible construction all operate at the forefront of the interpretative process rather than lurking somewhere towards the background.

What is the distinction between a subjective and objective approach?

At this juncture, it is perhaps beneficial to pause, take a step back and subject the distinction between a subjective and objective approach to much closer scrutiny.⁴⁴ The oft-versed assertion, which one would suggest is more of a caricature than a reality, is that legal systems based on the civilian tradition such as Germany,⁴⁵ France⁴⁶ and Italy⁴⁷ are more subjective in their approach to contractual interpretation than common law systems such as England. The inquiry is concerned with revealing the personal intent of the parties in accordance with the will theory. However, such a clichéd observation does a disservice to the subtlety of the interpretative approaches harnessed in legal systems grounded in the Civilian tradition. As Professors Vogenauer,⁴⁸ Markesinis, Unberath and Johnston⁴⁹ have accurately observed, the

⁴³ *Luminar Lava Ignite Ltd c MAMA Group Plc* [2010] CSIH 01; 2010 S.C. 310, 319 at para. [38]:

“... I see no error in law in the Lord Ordinary’s approach of considering first the words in question and then reassessing his view of them after having regard to the relevant background circumstances. It is not part of our law of contract that the court can have regard to relevant background circumstances only if there is ambiguity in the words of an agreement. The Lord Ordinary is supported by Lord Mustil’s view, which he quotes, that in most cases “the enquiry will start, and usually finish, by asking what is the ordinary meaning of the words used” – *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at p.384B-C.”

⁴⁴ See the discussion in S Vogenauer “Interpretation of Contracts: Concluding Comparative Observations” in A Burrows and E Peel (eds.) *Contract Terms* (Oxford, OUP, 2007) 123, 125-129.

⁴⁵ *Bürgerliches Gesetzbuch* art.133: “When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration.”

⁴⁶ *Code Civile* arts. 1156-1165: “One must in agreements seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms.”

⁴⁷ *Codice Civile* arts. 1362-1367: “In interpreting contracts, one must ascertain what was the common intention of the parties and one must not limit oneself to a consideration of the literal meaning of the words deployed.”

⁴⁸ Vogenauer “Interpretation of Contracts: Concluding Comparative Observations” in A Burrows and E Peel (eds.) *Contract Terms* (Oxford, OUP, 2007) 123, 149-150.

divide between civil law and common law systems is not as clearcut as might first appear.⁵⁰ Thus, it is somewhat artificial to talk of legal systems as having a 100 per cent subjective or objective measure of scrutiny. Nevertheless, constructing the indicators and hallmarks of such polar opposites is useful inasmuch as it enables a spectrum to be drawn, against which the approaches of Scots law and other legal systems can be plotted. To that extent, it is submitted that a purely subjective assessment would enjoin a court to consider what the parties individually or collectively intended to say in complete ignorance of the terms or words deployed. In this context, as Lord Reed noted in *Credential Bath Street Ltd v Venture Investment Placement Ltd.*, it is crucial to recognise the distinction between the individual and collective intentions of the parties.⁵¹ A search for the former would be undertaken by definition in isolation of the other contracting parties' intentions which is particularly unsound. Further, the interpretative process in Scots law has never involved the search for the former nor the latter in the absence of consideration of the words used. However, an examination of the latter in light of the terms of the written instrument did indeed pertain at one time under the leitmotif of the 'mutual intention of the parties'.

A 100 per cent subjective examination can be contrasted with a purely objective approach. In strict terms, a determination which is 100 per cent objective would empower the court to substitute its own judgment as to what was expressed for that of the parties. In terms of this formula, the court would second guess the judgment or intentions of the parties. A particularly emphatic description of an objective test was expounded by Rix LJ in *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd.*⁵² where he stated that on the application of an objective standard, 'the decision maker becomes the court itself'. A purely objective examination would

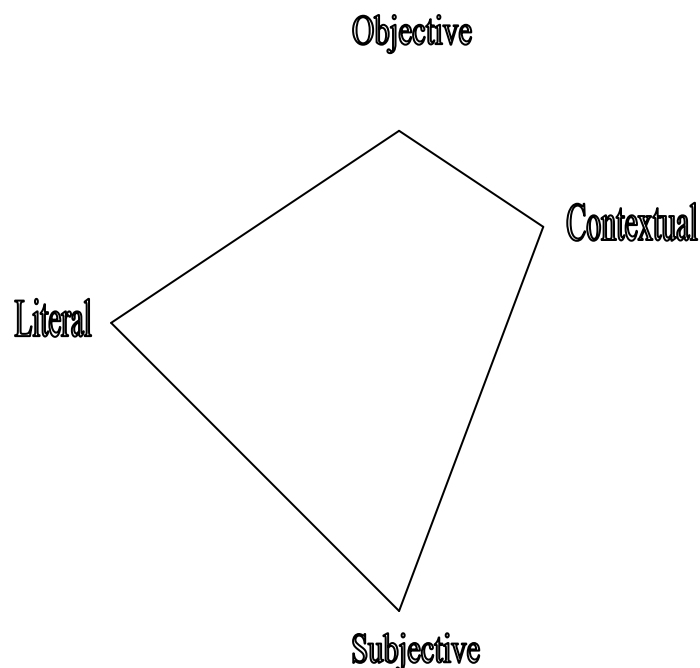
⁴⁹ B.S. Markesinis, H Unberath, A Johnston, *The German Law of Contract: A Comparative Treatise*, 2nd edition (Oxford, Hart Publishing, 2006) 136.

⁵⁰ See also Scottish Law Commission, *Interpretation in Private Law* (Scot Law Com No. 160) (1997) para. 1.18 at p.5 and E. Clive, "Interpretation", in K. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland* (Oxford, OUP, 2000), vol. 2, Chap. 2 at pp. 47-49 and 70-71.

⁵¹ *Credential Bath Street Ltd v Venture Investment Placement Ltd.* 2008 Hous. L.R. 2, 9 at para. [28].

⁵² *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd* (No. 2) [2008] 1 Lloyd's Rep. 558, at [66].

also empower the court to completely disregard the views and understandings of the contracting parties themselves. In such an extreme case, party autonomy, consent and intention would be completely overridden and it is clear that this is not what is happening where the current rules of interpretation are applied by the courts. At this juncture, it should also be noted that if one were to chart the subjective/objective spectrum, this would not coincide with another spectrum ranging from a 100 per cent literal construction at one end of the scale to a 100 per cent contextual approach at the other end (insofar as it is possible to conceive of the interpretative process as flowing seamlessly in terms of such a spectrum at all). The subjective approach does not entail consideration of the text in isolation, but rather the process can be conceived as an exercise in delving into the heads of the contracting parties and identifying their genuine and honest beliefs. Likewise, whilst the application of an objective approach enjoins a court to engage with the context, this is not so radical as to grant a licence to the court to ignore the text of the contract. Instead, it is suggested that the relationship between subjective, objective, literal and contextual approaches is more subtle and can be drawn in terms of an irregularly shaped trapezium, which might be plotted in the following manner:



The question which arises is where the Scots law approach to contractual interpretation is located on the subjective/objective spectrum painted above. The answer is that it probably lies somewhere towards the right of the median, since it would be absurd to contend that the current law is devoid of any subjective considerations. Perhaps the best way to understand the nature of the scrutiny applied by a court is to conceptualise it as involving the application of a ‘strong’ objective measure duly tempered by a ‘weak’ subjective strand. The approach is best understood as one which clings to a mixed subjective/objective approach since it is subjective to the extent that the focus on the surrounding circumstances relates to factors which pertained to the contracting parties at the time of formation and it is objective inasmuch as those factors are examined in light of what they would have meant to the reasonable business person ‘aware of the commercial context in which the contract occurs’.⁵³ Thus, the court is not applying its own judgment as to what was stated and overriding party consent, intention or autonomy. Rather, it is reaching a conclusion based objectively on what a reasonable business person stepping into the shoes of the parties would have considered to be the appropriate construction. A related critique of the approach of Scots law to construction is that the wider the scope of the ‘surrounding circumstances’ and the greater the importance afforded to the technique of the ‘commercially sensible construction’,⁵⁴ the more objective the process becomes and the greater the licence given to the judiciary to be creative. This may appear to be accurate, but it should not be taken too far or at face value, since the creativity of the courts is constrained by the aforementioned subjective element inherent within the process and as noted by Lord Drummond Young in *MRS Distribution Ltd. v DS Smith (UK) Ltd.*⁵⁵ the validity of such an argument is somewhat marginalised by the very nature of the Scottish system of written pleadings and other subjective interpretative factors which will be considered in more detail below.

⁵³ *Melville Dundas Ltd. v Hotel Corporation of Edinburgh Ltd.* 2007 SC 12, 23 at para. [17] per Lord Drummond Young.

⁵⁴ The commercial reality approach may be a tributary of the rule that absurd meanings are rejected, see L. Macgregor and C. Lewis, “Interpretation of Contract”, in R. Zimmermann, D. Visser and K. Reid (eds), *Mixed Legal Systems in Comparative Perspective* (Oxford, OUP, 2004), Chap. 3 at p. 91 and W. W. McBryde, *The Law of Contract in Scotland* (3rd edition, Edinburgh W Green 2007) para. 8-12 at p. 202.

⁵⁵ *MRS Distribution Ltd v DS Smith (UK) Ltd*, 2004 S.L.T. 631 at [14]

Does the current objective approach encroach upon the territory traditionally reserved to other rules or areas of contract law?

One might argue that the modern contextual approach which is applied towards contractual interpretation has serious repercussions for other legal principles, rule and doctrines of contract law. If this is so, one must ask what the implications may be for party consent and autonomy. Generally, it may appear that the objective approach acts as a territorial aggressor in such a fashion, but, on balance, it is submitted that in most cases, it does not. First, an issue which emerges is whether the law of contractual interpretation encroaches upon the territory which is the traditional and natural habitat of the law of error. For example, in the case of *Credential Bath Street Ltd v Venture Investment Placement Ltd.*,⁵⁶ Lord Reed noted that the interpretative process can be deployed to identify mistakes in expression contained in contracts and apply a construction which is consistent with the parties' shared meaning, but which may differ from the terms of the clause as drafted. One might argue that this is precisely what Lord Reed appears to have done in the case of *Macdonald Estates plc v Regenesis (2005) Dunfermline Ltd.*⁵⁷ The *Regenesis* case concerned a joint venture entered into between a property owner and a property developer. In terms of a management services agreement ("MSA"), it was provided that the joint venture company ("JVCo") would 'free and relieve [the property developer] on demand of all outlays reasonably required to be made by it as an incident of the performance of its obligations ... and the provision of the Services.' Thus, on the face of it, the MSA directed that the JVCo was bound to indemnify the property developer in respect of all reasonably incurred costs, including those which the JVCo had made in connection with the Services provided by the property developer to the JVCo. Nevertheless, Lord Reed concluded that:

“The words “it” and “its” [in the MSA] must be a mistake: the [JVCo] could not sensibly be undertaking to relieve the [property developer] of outlays

⁵⁶ *Credential Bath Street Ltd v Venture Investment Placement Ltd* [2007] Hous. L.R. at [17]-[24].

⁵⁷ *Macdonald Estates Plc v Regenesis (2005) Dunfermline Ltd* [2007] CSOH 123; 2007 S.L.T. 791.

which the [JVCo] had themselves made. Those words must be understood as meaning ‘you’ and ‘your.’”⁵⁸

Thus, one might contend that the inherent power of the court to rectify mistakes through the process of interpretation appears to invade the territory occupied by the law of error in consent. However, the present writer would reject such a view. First, there is abundant evidence that the courts have always been prepared to treat words as *pro non scripto* or substitute words where there has clearly been a mistake in the drafting. Traditionally, this has been treated as part of the package of responsibilities discharged by the rules of contractual interpretation.⁵⁹ Secondly, and more significantly, to adopt such a position confuses the distinction between the law of error in consent where the parties have effectively concluded no agreement and the situation where agreement has been reached, but a clerical mistake has been made in the drafting – which is the case here. For that reasoning, arguments about the marginalisation of the role of the law of error in consent are unconvincing and miss the point.

A second, related argument is that the more contextual approach to construction operates to narrow the rule that the courts cannot use their powers to substitute, add or interpolate words in contracts. Does the *Investors Compensation Scheme* contextual approach inflict some degree of intrusive surgery on this rule? Here, the judgment of Lord Reed in *Credential Bath Street Ltd v Venture Investment Placement Ltd*.⁶⁰ is instructive. Lord Reed recognised that it would be rare for a court to substitute, add or interpolate words on the basis (a) that to do so would render the clause or contract more commercially sensible or (b) of the surrounding circumstances. The rationale for such an approach is that the contract may simply amount to a bad bargain from which a party should not be saved on fairness grounds. The courts will not rewrite a contract for the parties, and in the words of Lord Hoffmann in *Att. Gen. of Belize v Belize*

⁵⁸ *Macdonald Estates Plc v Regenesis (2005) Dunfermline Ltd* [2007] CSOH 123; 2007 S.L.T. 791 at [114]. Writer’s annotations in square brackets.

⁵⁹ See the discussion by W. W. McBryde, *The Law of Contract in Scotland* (3rd edition, Edinburgh W Green 2007) para. 8-98 – 8-99 at pp. 236-237.

⁶⁰ *Credential Bath Street Ltd v Venture Investment Placement Ltd* [2007] Hous. L.R. 2, per Lord Reed at paras. [24]-[25], [36-37].

Telecom Ltd.,⁶¹ in such a case, ‘the loss lies where it falls.’⁶² Nevertheless, the objective construction may be harnessed to empower a court to substitute, replace, add or interpolate words where in the words of Lord Hoffmann in *Investors Compensation Scheme*, “something must have gone wrong with the language” or that the natural reading of the clause would “attribute to the parties an intention which they plainly could not have had.”⁶³ One might also refer to the speech of Lord Diplock in *The Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios)*, where his Lordship opined that where the natural reading of the words produces “a conclusion that flouts business commonsense”,⁶⁴ the contextual approach may be deployed to add or interpolate words.⁶⁵ Furthermore, in *Hombourg Houtimport BV v Agrosin Private Ltd (The Starsin)*, Lord Bingham observed that words may be added or interpolated where “it is clear ... that words have been omitted.”⁶⁶ The language employed by Lords Hoffmann, Diplock and Bingham demonstrate that recourse to the raw tools of contractual interpretation to add or subtract terms or words will be rare indeed, since the threshold is set at a particularly high level. For that reason, it is submitted that the successful application of such a technique will be exceptional which renders it unlikely that the interpretative process will be applied as a means of overriding the shared intention of the parties.

Another more compelling argument is that the current rules on contractual interpretation function to narrow the scope of relevance of the law of rectification. The wider the scope of the interpretative task, the greater the ineffectiveness of the statutory provisions on rectification.⁶⁷ The contention is that the once neat and clean dividing line which existed between the role of the law of construction as an

⁶¹ *Att Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 W.L.R. 1988

⁶² *Att Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 W.L.R. 1988 at 1993D.

⁶³ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR, 896 at 912–913.

⁶⁴ *Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 19 at 201.

⁶⁵ See also *Hombourg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 A.C. 715, per Lord Bingham at [23]

⁶⁶ *Hombourg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 A.C. 715, at [23]

⁶⁷ Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 8(1(a)). See also G. McMeel, “The Principles and Policies of Contractual Construction” in A Burrows and E Peel (eds.) *Contract Terms*, 2007, pp.27, 35-36 and A Burrows, “Construction and Rectification” in A Burrows and E Peel (eds.) *Contract Terms*, 2007, p.77.

interpretative endeavour and the role of the law of rectification as performing a corrective and adaptive function appears to have collapsed. However, the very least that can be said at this point is that the techniques of construction and rectification cannot be distinguished by invoking the subjective/objective continuum which was explored above: It would be erroneous to assert that construction is more concerned about discovering the meaning which the terms of a document would convey to a reasonable and objective business outsider standing in the shoes of the contracting parties, whereas rectification is about the correction of defective expressions as a means of realising the subjective ‘common’⁶⁸ and ‘actual (not deemed)’⁶⁹ intentions of the contracting parties. Instead, if the two processes of construction and rectification were to be plotted on the subjective/objective spectrum, they would both be marked off at corresponding locations, since both entail the application of objective elements.⁷⁰

Finally, there is considerable force in the assertion that the current interpretative process is not only influencing, but indeed usurping, the traditional role fulfilled by the rules on the implication of terms. In 1999, Sean Smith, advocate opined:

“The problem with [the approach in *Investors Compensation Scheme*] is that it appears to stray uncomfortably away from interpretation, strictly speaking, and towards the implication of terms... [and the] result [is] that the distinction between interpretation and implication becomes blurred.”⁷¹

⁶⁸ Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 8(1(a)).

⁶⁹ See *Shaw v William Grant (Minerals) Ltd.* 1989 SLT 121n, 121 per Lord McCluskey. The soundness of Lord McCluskey’s subjective approach was doubted by Lord Reed in *Macdonald Estates plc v Regenesis (2005) Dunfermline Ltd.* 2007 SLT 791, 822-823 at paras. [161]-[165].

⁷⁰ For example, in *Rehman v Ahmad* 1993 SLT 741, 752 Lord Penrose was of the view that the adoption by the legislature of the words ‘common intention’ in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 8(1(a)) enjoined the court to apply an objective approach. In *Macdonald Estates plc v Regenesis (2005) Dunfermline Ltd.* 2007 SLT 791, 822-823 at paras. [161]-[165] Lord Reed adopted the ‘provisional view’ (rather than conclusive opinion) that Lord Penrose’s approach in *Rehman* was sound. See also *Brown v Rysaffe Trustee Company (CI) Ltd.* [2011] CSOH 26 at para. [34] per Lord Glennie.

⁷¹ S C Smith, “Making Sense of Contracts” 1999 SLT (News) 307, 310-311. See also K. Lewison, *The Interpretation of Contracts*, 4th edn. (London, Sweet & Maxwell, 2007) 196-198.

Of course, if true, this is problematic, since the threshold for the implication of terms is one of necessity,⁷² whereas the threshold for interpretation of terms is reasonableness, i.e. the ‘reasonable business person’. Here, there is a discrepancy in the relevant standard, despite the fact that the width of enquiry which is required pursuant to the contextual approach to construction strays over into the process of implication. Moreover, since the recent decision of the Privy Council in *Attorney General of Belize v Belize Telecom Ltd.*,⁷³ it is submitted that matters have become even more obscured and it is arguable that the roles of construction and implication have travelled further down the road towards outright conflation. The advice of the board was delivered by Lord Hoffmann who opined that both the construction and implication of terms necessitated an objective enquiry. The following excerpt from the Board’s judgment delivered by Lord Hoffmann repays careful consideration:

“...the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building*

⁷² For implied terms in fact, see *The Moorcock* (1889) 14 PD 64, 68, *Liverpool City Council v Irwin* [1977] AC 239, 258B-C per Lord Cross, *William Morton & Co. v Muir Brothers & Co.* 1907 SC 1211, 1224 per Lord M’Laren, *McWhirter v Longmuir* 1948 SC 577, 589 per Lord Jamieson and *J & H Ritchie Ltd. v Lloyd Ltd.* 2007 SC (HL) 89, 94-95 per Lord Hope. For the minimum that is required to imply terms in law into a particular contract, see *Lister v Romford Ice & Cold Storage Co.* [1957] AC 555, 576 per Viscount Simonds, *Liverpool City Council v Irwin* [1977] AC 239, 255 per Lord Wilberforce, *Scally v Southern Health and Social Services Board* [1991] IRLR 522, 525 at para. [12] per Lord Bridge, *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 339 and 354 per Lords Bridge and Oliver respectively; *Johnson v Unisys Ltd.* [2001] IRLR 279, 286 at para [35] per Lord Hoffmann; *Reid v Rush and Tompkins Group plc* [1989] IRLR 265, 269 per Gibson LJ and *Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd.* [1986] AC 80, 104–105 per Scarman LJ and Gloag, *Contract* (2nd edn, 1929) 286.

⁷³ *Att Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 W.L.R. 1988

Society [1998] 1 WLR 896, 912—913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.”⁷⁴

Whilst the above passage could fuel a further academic paper by itself, duly exploring its implications for the relationship between the processes of construction and implication, the writer would prefer not to deviate from the principal theme of consent. In that vein, it is particularly noteworthy that the endeavour pursued in the context of the implication of terms is about ascertaining the ‘presumed intention’ of the parties,⁷⁵ rather than the actual intentions of the parties which it has been suggested is the purpose of the law of rectification.⁷⁶ For that reason, it is contended that the obfuscation of the threshold between the process of construction and implication of terms inflicts no harm upon the central notions of consent, autonomy and intention in contract law.

Does the current objective approach foster unwarranted judicial creativity and the marginalisation of party consent, intention and autonomy?

The current approach to contractual interpretation adopted by the Scottish courts places great importance on the background knowledge which was, or ought reasonably to have been, available to the parties, the circumstances surrounding the inception of the contract, the whole matrix of facts and the commercially sensible construction. These factors undoubtedly enjoin a court to apply an objective measure of scrutiny to their task at hand. However, as has already been noted, this is duly constrained by the subjective element referred to above, i.e. the need for the objective business outsider to step into the shoes of the contracting parties. The courts’ interpretative task is further tempered by subjective factors which may or may not be

⁷⁴ *Att Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 W.L.R. 1988 at 1993A-C

⁷⁵ *Liverpool City Council v Irwin* [1977] AC 239, 266E per Lord Edmund-Davies and *Attorney General of Belize v Belize Telecom Ltd.* [2009] 1 WLR 1988, 1993C (PC) per Lord Hoffmann. See also K. Lewison, *The Interpretation of Contracts*, 4th edn. (London, Sweet & Maxwell, 2007) 191 and 194.

⁷⁶ *Codelfa Construction Pty Ltd. v State Rail Authority of NSW* (1982) 149 CLR 337, per Mason J. at [5]

appropriate to consider or consult depending on the facts of the case. For example, where the parties have adopted a ‘private dictionary’, the subjective meaning understood by the parties must be applied by the courts.⁷⁷ A similar rule is that special or technical words or terms should be construed according to that special or technical sense where this is the meaning understood by the parties.⁷⁸ Furthermore, terms which are understood as having a particular meaning through custom and usage ought to yield to that construction.⁷⁹

However, the hostility of the courts to the admissibility of documents which are reflective of the pre-contractual understandings of the parties, which was recently re-asserted by Lord Hoffmann in *Chartbrook Ltd. v Persimmon Homes Ltd.*⁸⁰ does limit the scope to which subjective factors will be taken into account. Likewise, the rule against the admissibility of evidence of the subsequent conduct of the parties as an aid to construction⁸¹ arguably achieves the same effect. Here, adopting the approach of Lord Hoffmann in *Chartbrook Ltd. v Persimmon Homes Ltd.*,⁸² evidential materials such as pre-contractual communications or subsequent conduct are categorised as being indicative of subjective, rather than objective factors. Interestingly, academic, judicial and practitioner commentators have indicated that the principle against the admissibility of subsequent conduct is one which is difficult to sustain and which is ripe for reform.⁸³ Indeed, continental jurisdictions⁸⁴ harbour no concerns in relation to

⁷⁷ McBryde, *Contract*, 2007, para. 8-50.

⁷⁸ Gloag, *Contract* (2nd edn, 1929) 365 and 400. This is an old rule, e.g. see *Coutts & Co.* (1758) Mor. 11549, *Carricks v Saunders* (1850) 12 D 812 and 922. A more modern example is *Leverstop Ltd v Starling* 1993 GWD 23-1461.

⁷⁹ Gloag, *Contract*, 1929 pp.378-381. This is probably an aspect of the rule that technical words should be given a technical meaning.

⁸⁰ *Chartbrook Ltd v Persimmon Home Lts* [2009] UKHL 38; [2009] 1 AC 1101.

⁸¹ *Cameron (Scotland) Ltd v Melville Dundas Ltd* 2001 SCLR 691, 695-696 at paras. [27]-[31] per Lord Hamilton, *Westbury Estates Ltd. v The Royal Bank of Scotland plc* 2006 SLT 1143, 1151 at para. [38] per Lord Reed and *Ballast plc v Laurieston Properties Ltd. (In Liquidation) and others* [2005] CSOH 16 at paras. [157]-[159] per Lady Paton.

⁸² *Chartbrook Ltd v Persimmon Home Lts* [2009] UKHL 38; [2009] 1 AC 1101 at [38]

⁸³ J. Steyn, “The Intractable Problem of the Interpretation of Legal Texts” (2003) *Sydney Law Review* 5, 10, G. McMeel, “Prior Negotiations and Subsequent Conduct- The Next Step Forward for Contractual Interpretation?” (2003) 119 *Law Quarterly Review* 272, 293-297, D. (Lord) Nicholls, “My Kingdom for a Horse: The Meaning of Words” (2005) 121 *Law Quarterly Review* 577, 586 and 588-589, T. Bingham, “A

the admissibility of such subsequent actings and neither does the Draft Common Frame of Reference.⁸⁵ Here, I would echo the sentiments of Lord Bingham to the effect that ‘I would not put money on [the] survival [of the rule against admitting evidence of subsequent conduct]’.⁸⁶ Another difficulty lies in drawing the line between evidence which amounts to ‘pre-contractual negotiations’, which of course, is inadmissible and evidence which forms part of the surrounding circumstances or the parties’ background knowledge, which indeed may be had regard to by a court.⁸⁷ Lord Hoffmann has attempted to argue that the threshold criterion between the two categories is equivalent to the distinction between objective and subjective material, i.e. that the surrounding circumstances are objective, whereas prior communications are ‘drenched in subjectivity’.⁸⁸ It is submitted that this appears to be a rather blunt and simplistic approach which may break down at the margins.⁸⁹ The same challenge of establishing a threshold criterion exists in drawing the distinction between evidence of subsequent conduct and surrounding circumstances.⁹⁰ These classificatory issues will

New Thing Under the Sun: The Interpretation of Contract and the ICS Decision” (2008) 12 *Edinburgh Law Review* 374, 390 and D. McLauchlan, “Contract Interpretation: What is it About?” (2009) 31 *Sydney Law Review* 5, 42-47.

⁸⁴ Codice Civile, Art. 1362: “In order to ascertain the common intention of the parties, one must assess the totality of their conduct, including conduct subsequent to the contract”.

⁸⁵ Christian von Bar and Eric Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Munich: Sellier, 2009).

⁸⁶ Lord Bingham of Cornhill, “A New Thing Under the Sun” (2008) 12 *Edin. L.R.* 374, 390

⁸⁷ See *Reardon Smith Line v Hansen-Tagen* [1976] WLR 989 at 995H per Lord Wilberforce, *Bank of Scotland v Dunedin Property Investment Co Ltd.* 1998 SC 657 at 665 per Lord Rodger, *Howgate Shopping Centre Ltd. v GLS 164 Ltd.* 2002 SLT 820, 825 at para. [23] per Lord Macfadyen, *City Wall Properties (Scotland) Ltd. v Pearl Assurance plc* [2007] CSIH 79 at para. [22] per Lord Phillip and *Luminar Lava Ignite Ltd v Mama Group & Mean Fiddler* [2009] CSOH 68, 2009 GWD 19-305 at para. [14] per Lord Glennie. Recently, it has been endorsed resoundingly by Lord Hoffman in the House of Lords in *Chartbrook Ltd. v Persimmon Homes Ltd.* [2009] UKHL 38; [2009] 1 AC 1101, 1117F-1119F at paras. [33]-[38].

⁸⁸ See *Chartbrook Ltd. v Persimmon Homes Ltd.* [2009] UKHL 38; [2009] 1 AC 1101, 1119B-F at para. [38]. See also the approach in *Luminar Lava Ignite Ltd v Mama Group plc & Mean Fiddler Holdings Ltd.* [2010] CSIH 01; 2010 SC 310, 320-321 at paras. [41]-[45] per Lord Hodge.

⁸⁹ See the discussion in *Review of Contract Law: Discussion Paper on Interpretation of Contract* (Scot Law Com Discussion Paper No. 147) (2011) para. 5.19 at p. 52.

⁹⁰ See *Cameron (Scotland) Ltd v Melville Dundas Ltd* 2001 SCLR 691, 695-696 at paras. [30]-[31] per Lord Hamilton and *Wincanton Group Ltd v Reid Furniture plc* [2008] CSOH; 2008 GWD 29-446, at para. [16] per Lord Glennie.

continue to exist so long as material which is labelled as prior communings and subsequent conduct is deemed to be an irrelevant consideration. Indeed, in its recent Discussion Paper, the stance of the Scottish Law Commission was consistent with the abolition of the ban on pre-contractual communings and subsequent actings.⁹¹

The question which remains is the extent to which interpretative techniques such as the surrounding circumstances, factual matrix, background knowledge and the commercially sensible construction which are comprised within the objective measure of scrutiny lead to unwarranted and excessive judicial creativity. The writer's answer to this question is clear: On balance the current approach does not foster or promote excessive judicial creativity or the narrowing of the importance or role of party autonomy. The justifications for this view are that the presence of subjective factors are sufficiently powerful to (i) offset the effects caused by the inadmissibility of subjective elements such as prior communings and subsequent conduct and (ii) chisel away at some of the creative urges which the overall objective theory of contractual interpretation may tempt the judiciary into applying. A related point to be addressed is whether the dynamics of the objective approach empower the courts to re-write contracts leading to the elision of party consent and autonomy? It is suggested that there is no uniform response to this question which holds in all cases and the writer is sceptical or at best, agnostic, about the prescience of any accusation that party consent is marginalised by the objective and contextual approach. Since legal formalism in this area of law has been rejected, different interpretative techniques will be afforded precedence in various cases. As argued by the writer before,⁹² it is counter-productive to conceptualise the objective approach in terms of fixed rules espousing a hierarchy of interpretative criteria. Instead, the author is of the view that how the range of interpretative criteria are applied from case to case ought to be understood in terms of a casuistic, rather than dogmatically rigid process, with the relevant criterion or criteria selected being dependent on its or their relevancy to the interpretative endeavour in a given case. For example, the application of a commercially sensible construction may be wholly inapposite where the contract captures a non-commercial

⁹¹ See *Review of Contract Law: Discussion Paper on Interpretation of Contract* (Scot Law Com Discussion Paper No. 147) (2011) paras. 7.15 and 7.18 at pp. 74-76.

⁹² D. Cabrelli, "The Effect of Past and Subsisting Breaches on Contractual Rights" [2009] 13 *Edinburgh Law Review* 293.

arrangement. In such circumstances, the appropriate response may be to attach greater weight to the surrounding circumstances or alternatively, the text itself. In another case, the surrounding circumstances may reveal little, yet the commercial objective of a clause may be clear.⁹³ A further possibility is that both criteria may prove to shed no light whatsoever, in which case, the natural and ordinary meaning of the words will be applied. In such matters, the dynamics can be summarised in the layperson's motif of 'horses for courses'. Furthermore, a natural rein ought also to be placed on any potential excessive judicial creativity by the need to confine the scope of enquiries to the matters averred and narrated in the parties' written pleadings and the need for the court to adopt a construction which is reflective of the understanding of the reasonable person who has stepped into the shoes of the parties. Where two competing interpretations are equally plausible, the requirement to adopt the persona of the objective reasonable person should channel the court towards a process which examines their relative workability and the construction which is more workable than the other should be preferred.⁹⁴

However, the above is subject to a particular caveat. That is to say that the interpretative tool of the 'commercially sensible construction' may be a double-edged sword. A liberal deployment of such an instrument may lead to the elision of the significance of compromise if it is acknowledged that it represents a facet of consent and party autonomy. In *Credential Bath Street Ltd v Venture Investment Placement Ltd.*,⁹⁵ *Forbo-Nairn Ltd. v Murrayfield Properties Ltd.*,⁹⁶ *G4S Cash Centres (UK) Ltd v Clydesdale Bank plc*⁹⁷ and *MacIntyre House Ltd. v Maritsan Developments Ltd.*,⁹⁸ Lords Reed, Hodge and Menzies highlighted the fact that the courts need to be alive to the danger that the commercially sensible construction might be applied to

⁹³ For example, see *Trygort (Number 2) Limited v UK Home Finance Ltd.* [2008] CSH 56, 2008 SLT 1065.

⁹⁴ *Luminar Lava Ignite Ltd v Mama Group plc & Mean Fiddler Holdings Ltd.* [2010] CSH 01; 2010 SC 310, per Lord Eassie at [15]

⁹⁵ *Credential Bath Street Ltd v Venture Investment Placement Ltd* [2007] Hous. L.R. 2, per Lord Reed at [36]-[37]

⁹⁶ [2009] CSH 47, per Lord Hodge at [13]. The case of *Forbo-Nairn Ltd. v Murrayfield Properties Ltd.* [2009] CSH 94 was appealed to the Inner House, but the Inner House did not overturn Lord Reed's decision.

⁹⁷ *G4S Cash Centres (UK) Ltd v Clydesdale Bank Plc* [2010] CSH 133; 2010 G.W.D. 38-771 at [28].

⁹⁸ *Macintyre House Ltd v Maritsan Developments Ltd* [2011] CSH 45 at [34].

supersede a bad bargain which has been agreed by a party through the dynamics of compromise and concession in the commercial negotiation process.⁹⁹ The writer would also add that this danger is compounded by the fact that the scope for concession and compromise to be revealed in court is constrained since evidence of pre-contractual negotiations continues to be inadmissible post-*Chartbrook Ltd. v Persimmon Homes Ltd.*¹⁰⁰ For this reason alone, the writer is in favour of the lifting of the embargo on pre-contractual negotiations. This would enable direct evidence of concessions and compromise to be pleaded which would circumscribe the potential for the commercially sensible construction to operate as an ‘unruly horse’.

One example where it is perfectly possible (but not certain) that the commercially sensible construction may have superseded an express term which found its way into the contract through concession and compromise is the case of *Macdonald Estates plc v Regenesis (2005) Dunfermline Ltd.*¹⁰¹ Here, one will recall that it was held that where a property owner had agreed to pay a property developer a fee for certain Services, some of which it would require sub-contractors to perform, it made no commercial sense for the terms of the contract to be construed in a manner which also required the property owner to reimburse the property developer in respect of professional and other costs which the property developer had incurred in employing third parties. Here, there is an argument that Lord Reed may have engaged the interpretative construct of the ‘commercially sensible construction’ in a manner which may have (i) departed from the commercial realities of the property development market or (ii) overlooked the fact that what appeared to be an onerous commitment may well have been conceded in return for agreement on another or more important provision of the same contract. For example, it would be unusual for a property developer to engage in-house professionals and consultants and so it was more or less inevitable that it would have to instruct outside third parties for professional advice. To that extent, it may have been wholly legitimate for the JVCo to agree to indemnify

⁹⁹ A matter also noted by the Scottish Law Commission in *Review of Contract Law: Discussion Paper on Interpretation of Contract*, 2011, para. 5.16 and in particular at paras. 5.13 – 5.15.

¹⁰⁰ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101. *Luminar Lava Ignite Ltd v Mama Group plc & Mean Fiddler Holdings Ltd.* [2010] CSIH 01; 2010 S.C. 310, per Lord Hodge at [40].

¹⁰¹ *Macdonald Estates Plc v Regenesis (2005) Dunfermline Ltd*, 2007 SLT 791.

the property developer in respect of such costs, duly reflecting the realities of the marketplace.¹⁰²

An alternative objection to the prominence of the commercially sensible construction is that it assumes that the judiciary are sufficiently equipped to engage in commercial decision-making. It is suggested that this may be somewhat misplaced, something which the judiciary themselves have not been inhibited from reminding themselves in the past.¹⁰³ The writer would submit that the risk is that the construct of the commercially sensible construction develops into something of an ‘unruly horse’ which cannot be reined in once the stable door has bolted.

Conclusion

For the reasons advanced in this paper, it is contended that the adoption of an increasingly objective approach towards the construction of contracts is not necessarily consistent with the marginalisation of the importance of the role of consent in contract law. However, this is subject to the peril that the commercially sensible construction may evolve into something which overshadows the other interpretative tools and operates to suppress the significance of consent articulated through concession and compromise. An altogether different and more pressing issue is the effect of the current approach to construction upon commercial certainty. Amongst legal practitioners¹⁰⁴ and law and economics scholars,¹⁰⁵ the current objective approach is less than popular for the uncertainty and inefficiencies which it generates in commercial contracting.¹⁰⁶ The writer would end with the simple

¹⁰² I am thankful to my colleague Laura Macgregor for the identification of this point.

¹⁰³ *Chiswell Shipping and Liberian Jaguar Transports Inc v National Iranian Tankers Co (The World Symphony and The World Reknown)* [1992] 2 Lloyd’s Rep. 115, per Lord Donaldson MR at 117; *Capital Land Holdings Ltd. v Secretary of State for the Environment* Unreported 16 May 1995 OH, per Lord Penrose; *Credential Bath Street Ltd v Venture Investment Placement Ltd* [2007] CSOH 208; Hous. L.R. 2 at para. [24].

¹⁰⁴ R. Calnan, “Construction of Commercial Contracts: A Practitioner’s Perspective” In *Contract Terms*, 2007, pp.18-20

¹⁰⁵ Schwartz and Scott, “Contract Theory and the Limits of Contract Law” 113 Yale L.J. 541.

¹⁰⁶ A suggestion worthy of consideration is whether the relationship between certainty and formation, interpretation, implication of terms and rectification in contract law

observation that there is an air of inevitability about the emergence of more objective criteria such as the commercially sensible construction and surrounding circumstances as the dynamics of the commercial contracting process becomes more and more complex and influenced by technology. That is to say, that the prevalence of subjective criteria are inversely proportional to the complexity of contracts.¹⁰⁷

might represent a fruitful source of discussion and debate amongst academics, practitioners and members of the judiciary at a future workshop or conference.

¹⁰⁷ See the discussion in G. McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford, Oxford University Press, 2007), para. 1.77; Scottish Law Commission, *Interpretation in Private Law*, 1997, paras. 1.15, 1.18; Clive, “Interpretation”, in *A History of Private Law in Scotland*, 2000, vol. 2, p.49.